THARPE & HOWELL, LLP

EMPLOYMENT AND LABOR LAW NEWSLETTER

MARCH 2011 EDITION

This informational Newsletter is brought to you by Christopher Maile, Chair of Tharpe & Howell's Employment and Labor Law Practice Group. Please feel free to contact "Chris" at cmaile@tharpe-howell.com; or telephone number (818) 205-9955 to discuss any questions or comments you might have.

ACTIVE MILITARY DUTY NOT REQUIRED FOR PROTECTION UNDER USERRA

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), employers cannot discriminate against employees based on military status:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

The issue of **when** protection under USERRA is triggered was recently addressed by the United States Court of Appeal.

In *Angel Vega-Colon v. Wyeth Pharmaceuticals*, Angel Vega-Colon ("Vega") was employed by Wyeth. During his employment at Wyeth, Vega also alternated between active and inactive status in the Army Reserves. In February of 2006, he advised his supervisor at Wyeth that he may be returning to active duty and would probably be deployed. In April of 2006, the position of "reliability engineer" became available at Wyeth and Vega applied. He was not promoted to the job.

In 2007, Vega received a performance review from Wyeth for the 2006 employment year. Although he had received positive ratings the several consecutive years before, he was now advised that his performance needed improvement. Vega disagreed and requested an investigation. Shortly thereafter, Vega filed a discrimination complaint with the United States Department of Labor, Veterans' Employment and Training Services ("VETS"), based on Wyeth's failure to hire him for the reliability engineer position. Eventually, Vega withdrew the VETS complaint.

In May of 2007, Vega met with Wyeth's employee relations and site directors, though what was discussed at this meeting is in dispute. According to Wyeth, the parties discussed the company's investigation into Vega's 2006 performance evaluation, which found that no discriminatory actions had occurred. Also according to Wyeth, Vega made a threatening comment at the meeting which referenced the Virginia Tech massacre. Vega denied this version of events.

Shortly after the meeting, Vega, who was on leave, went to work to drop off his military orders but was denied access to the Wyeth plant. He was informed by a security guard that Wyeth's database listed him as terminated. Wyeth contends that Vega was not in fact fired but concedes his access was restricted due to security concerns over his comment about the Virginia Tech massacre. Notably, Vega never received a termination letter and he continued to receive a salary and benefits.

At some point, Vega returned from leave with his access to the plant restored. Then, in July of 2007, he was placed on a "performance improvement plan" ("PIP"). Vega timely completed the PIP objectives but, in November, was advised it would be extended until his return from military leave. Vega's Army unit was mobilized that month.

Prior to being deployed, Vega instituted the underlying action claiming Wyeth discriminated against him by (1) failing to hire him for the reliability engineer position; (2) awarding him a low performance rating; (3) extending the PIP; (4) discharging and then reinstating him; (5) allowing a hostile work environment; and (6) retaliating against him for filing the VETS complaint. In response, Wyeth moved for Summary Judgment. The Trial Court ruled in favor of Wyeth on all claims, finding that the actions complained of by Vega all took place **prior to** his return to active duty and deployment, and therefore were not protected by USERRA. Vega appealed.

Although the 2st Circuit agreed with the Trial Court's decision dismissing most of Vega's causes of action, it reversed the dismissal in relation to Wyeth's extension of the PIP during Vega's military leave. The Court noted that in the PIP itself, it stated the PIP would be extended until after Vega's return from military leave so that "positive behavior and work habits could be verified," and that the PIP cited Vega's military leave as one of the reasons the extension was being required. The Court found that to deny an employee such as Vega the protections of the Act **until after** an application for leave is delivered and signed - would be contrary to the Act's purpose which is to protect those interested in military service.

"Stray Remarks" Doctrine Not To Be Strictly Applied

Until recently, employers have relied heavily on the "Stray Remarks Doctrine" when fighting age discrimination complaint. Under this doctrine, potentially discriminatory statements made to or about an employee by company non-decision-makers, or made by decision makers outside of the decisional process, could often be excluded from evidence on the basis that the statements were irrelevant and insufficient to prove a discriminatory practice had occurred. But a recent decision by the California Supreme Court now makes such damaging statements much harder to overcome.

In *Brian Reid v. Google, Inc.*, plaintiff Reid worked at Google as the Director of Operations and Engineering between June 2002 and February 2004. After Reid's first year, the VP of engineering, Rosing, noted very positive remarks in Reid's performance review. (This was the only written review Reid received during his employment at Google.) However Rosing also commented that adapting to Google's culture was the primary task for the first year and that, right or wrong, Google was simply different: "Younger contributors, inexperienced first line managers, and the super fast past are just a few examples of the environment."

Google eventually terminated Reid's employment, and Reid filed an age discrimination complaint. Reid alleged that at the time of termination, Google advised he was culturally not a good fit and that performance had nothing to do with its decision to terminate. Reid also alleged that Holzle and other employees made derogatory age-related remarks to Reid while he was employed at Google, such as calling him slow, fuzzy, sluggish, and by saying his opinions and ideas were obsolete. According to Reid, Holzle made age-related comments to Reid every few weeks and other co-workers also made age related disparaging remarks. Also, inter-office email communications suggested an internal decision had been made to ensure Reid would not obtain another position within the enterprise.

Google file a Motion for Summary Judgment in response to Reid's claim, arguing the Stray Remarks Doctrine applied making the alleged statements inadmissible. The Trial Court found that the remarks had **not** been made by the decision maker (who was himself more than 50 years old), and were indeed "stray remarks" not connected to the decision to terminate. Eventually, the matter was reviewed by the California Supreme Court.

The California Supreme Court found that deciding what weight to give the remarks was for a jury to decide. It also opined that Summary Judgment determinations (such as the one previously rendered in this case) must be based "on the totality of the evidence, including any relevant discriminatory remarks." Although employers will still be able to use the Stray Remarks Doctrine as a defense against discrimination claims, statements made by non-deciding employees will now be much harder to overcome.

STATUTE FOR LATE WAGE PENALTIES EXTENDED FOR CALIFORNIA EMPLOYEES

In California, when an employee is terminated or resigns from his or her job, the employer must pay final wages immediately under *Labor Code* Sections 201 and 202. Section 203 provides that if the employer willfully fails to timely pay the final wages due, "the wages of the employee shall continue *as a penalty* from the due date thereof at the same rate until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days." Although this may not seem like a lot of dough when thinking about penalties for a single employee and a few days of a late wage pay, the amount can be catastrophe to employers in class-action suits where hundreds (or even thousands) of previous employees are involved.

Previously, a California employee had a one year statute of limitation within which to make a late wage penalty claim. However, in *Jorge Pineda v. Bank of America*, the California Supreme Court recently held that employees have up to **three years** after the date of the final wage payment to file suit for late wage penalties. Accordingly, this extended filing date may now cause a flood of new class actions to be filed.

In *Pineda*, Jorge Pineda ("Pineda") was employed by Bank of America ("BofA"). He gave two weeks' notice of his resignation, which on May 11, 2006, but BofA did not pay his final wages until May15th – four days late. Pineda subsequently filed an action against BofA on October 22, 2007, seeking to represent a class of former BofA employees whose final wages were also untimely paid. The complaint asserted two causes of action: (1) that BofA failed to timely pay plaintiff and class members final wages as required under *Labor Code* section 201 (applying to employees who are terminated) or Section 202 (applying to employees who quit) and that penalties were owed pursuant to Section 203. Plaintiff's second Cause of Action alleged that BofA's failure to timely pay final wages violated California's Unfair Competition Law ("the UCL"), and also sought unpaid penalties under Section 203.

BofA filed a Motion for Summary Judgment, and the Trial Court ruled on its behalf. In reaching its decision, the Court concluded that a one-year statute of limitations applies when an employee files an action seeking *only* section 203 penalties (as opposed to an action seeking unpaid wages *and* section 203 penalties). Thus, the Court determined that the time for plaintiff to file his action had expired. The Trial Court also concluded that section 203 penalties are not recoverable as restitution under the UCL. The Court of Appeal affirmed in all respects, and the California Supreme Court granted a petition for review.

The California Supreme Court agreed with the Appellate Court's ruling that *Labor Code* section 203 penalties are **not** recoverable as restitution under the UCL. However, it reversed its decision on the statute of limitations issue – finding it to actually be three years. The Supreme Court found that while California's Code of Civil Procedure provides for a one-year statute of limitation in actions for a "penalty" or "forfeiture," the language in Labor Code section 203 provides for the longer, three year statute of limitation to apply.

TRANSFERRING PREGNANT EMPLOYEE TO ANOTHER POSITION CAN BE DISCRIMINATORY

In *Heather Spees v. James Marine, Inc., et al.,* the United States Court of Appeal recently held that transferring a pregnant employee to another position can sometimes be discriminatory. In this case, Heather Spees ("Spees") was hired by James Marine, Inc. ("JMI") as a welder. The position was physically demanding and, like all other company welders, she was exposed to fumes, dust, and vapours during the course of her work. To make matters worse, temperatures sometimes reached more than 100 degrees in the plant. However, Spees liked her job and was described by her foreman as being a good employee.

Shortly after accepting the position, Spees became pregnant. Although her physician authorized her to continue work as a welder without restriction, JMI voiced continued concern for her safety and the safety of her unborn child. Spees' brother was also an employee of JMI, and Spees' supervisor was aware that she had suffered from a miscarriage in the past. JMI felt the original doctor's note was insufficient given the harsh conditions of the workplace, and requested a second note which put Spees on light duty and required she avoid toxic fumes. Spees obtained and presented this second note to JMI, which advised that a decision had already been made to transfer her from welding to the tool room. Although the tool room position required less training, Spees' salary and benefits remained the same.

A week after the transfer, JMI switch Spees from the temporary day shift in the tool room to a permanent opening which was at night. Shortly thereafter, Spees' doctor confined her to total bed rest. Because she had only worked for the company for a short period of time, Spees had not yet accumulated any personal time and was not eligible for FMLA leave. Her employer subsequently terminated the employment relationship and Spees filed suit for pregnancy and disability discrimination. The employer filed a Motion for Summary Judgment, which was granted by the District Court. Spees appealed.

The Court of Appeal affirmed the District Court's ruling with regard to Spees' claims of discrimination as they relate to the termination of the employment relationship. However, it reversed the District Court's ruling to the extent that Spees' claims were based on her transfer to the tool room. The Court noted that JMI had decided to transfer Spees to the tool room **before** it requested the second physician's note, suggesting that the transfer was made due to concerns that a pregnant welder may not be able to safely perform the job. It found that because Title VII requires an employee (such as Spees) to demonstrate that pregnancy was *a* motivating factor in the adverse decision, and does not require that it be the *only* motivating factor, JMI could be liable for pregnancy discrimination for transferring her to the tool room.

The Court further found that an increased risk of having a miscarriage may qualify as a disability under the American with Disabilities Act. In this case, because JMI considered Spees to be at increased risk of miscarriage, and it was a motivating factor in transferring her to the tool room, the Court held the transfer could also be in violation of the ADA. The Court noted that although Spees' pay and benefits were not decreased when she was transferred to the tool room, the tool room position itself could be viewed as a demotion due to the lack of training required. Therefore, Spees' transfer to the tool room could be considered an adverse employment action.

THARPE & HOWELL, LLP
www.tharpe-howell.com

15250 Ventura Blvd., 9th Floor
Sherman Oaks, CA 91403
Phone: (818) 205-9955

1226 State Street, 2nd Floor
Santa Barbara, CA 93101
Phone: (805) 962-4000

600 W. Santa Ana Blvd., Ste. 705
Santa Ana, CA 92705
Phone: (714) 437-4900

516 West Shaw Avenue
Fresno, CA 93704
Phone: (559) 221-2670

770 L Street, Ste. 950
Sacramento, CA 95814
Phone: (916) 492-6000

225 Bush Street, 16th Fl.
San Francisco, CA 94104
Phone: (415) 439-8840

11622 El Camino Real
San Diego, CA 92130
Phone: (858) 764-2577

3425 Cliff Shadow Parkway
Las Vegas, Nevada 89129
Phone: (702) 562-3301

955 S. Virginia Street, Suite 116
Reno, Nevada 89502
Phone: (775) 786-6200

2425 E. Camelback Rd., Ste. 950
Phoenix, Arizona 85016
Phone: (602) 340-1234

2150 S. 1300 East, Ste. 500
Salt Lake City, Utah 84106
Phone: (801) 337-3997

This informative Newsletter has been brought to you by Christopher Maile, a Partner of Tharpe & Howell and Chair of its Employment and Labor Law Practice Group. Tharpe & Howell has been part of the California, Arizona, Nevada and Utah business communities for more than 34 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service and case personalized attention, and to be an integral member of each client's team.

For further injury about any of the articles discussed, please contact Mr. Maile direct at (818) 205-9955; Email: cmaile@tharpe-howell.com